UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JESSY BOUSTANY, Plaintiff, -against- XYLEM INC. and GEORGE EL HANI, *Individually*, Defendants.	Case 1:15-cv-10023-GHW

DEFENDANT GEORGE EL-HANI'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS COMPLAINT AND STAY DISCOVERY PENDING DETERMINATION OF THE MOTION

STEWART OCCHIPINTI, LLP
Charles A. Stewart, III
One Exchange Plaza
55 Broadway, Suite 2200
New York, New York 10006
Tel: (212) 239-5500
Fax: (212) 239-7030
cstewart@somlaw.com

Attorneys for Defendant George El-Hani

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. BACKGROUND 3

A. Plaintiff's Complaint 3

B. Service of the Complaint 4

C. Defendant El-Hani's Lack of New York Contacts 5

III. ARGUMENT 6

A. This Action Must Be Dismissed As Against Defendant El-Hani 6

1. The Complaint Against Defendant El-Hani Must Be Dismissed Because Service of Process is Defective 6

2. This Court Lacks Personal Jurisdiction of Defendant El-Hani 7

a. Standards for Dismissal for Lack of Personal Jurisdiction 7

b. Defendant El-Hani Does Not Regularly Transact Business in New York 8

c. New York's "Long-Arm" Statute Does Not Permit Jurisdiction Over Defendant El-Hani 9

d. The Exercise of Jurisdiction Over Defendant El-Hani Would Offend Traditional Notions of Fair Play and Substantial Justice 12

3. Plaintiff Has Failed to State a Cause of Action Against Defendant El-Hani Under New York Executive Law §296 13

a. Standards for Dismissal for Failure to State a Claim 13

b. Plaintiff Has Failed to Allege that Defendant El-Hani's Conduct Had Any Impact in New York 14

c. Plaintiff is Barred From Asserting Claims Against Defendant El-Hani 16

B. Pending this Court's Determination of this Motion, All Discovery Should be Stayed 16

IV. CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Albert v. DRS Techs., Inc., No. 10-3886, 2011 U.S. Dist. LEXIS 55320 (D. N.J. May 23, 2011) 15

Anderson v. United States Attorneys Office, 1992 WL 159186 (D.D.C. June 19, 1992) 17

Anti-Monopoly, Inc. v. Hasbro, Inc., 1996 U.S. Dist. LEXIS 2684 (S.D.N.Y. Mar. 7, 1996) 17

Arnold v. Cargill, Inc., 2002 U.S. Dist. LEXIS 13045 (D. Minn. July 15, 2002) 15

Arrowsmith v. United Press Intern., 320 F.2d 219 (2d Cir. 1963) 8

Arrow Trading Co. v. Sanyei Corp., 576 F. Supp. 67 (S.D.N.Y. 1983) 8

Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 107 S. Ct. 1026 (1987) 12

Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937 (2009) 14

A.W.L.I. Group, Inc. v. Amber Freight Shipping Lines, 828 F. Supp. 2d 557 (E.D.N.Y. 2011) 7

Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779 (2d Cir. 1999) 7

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955 (2007) 13, 14

Benham v. eCommission Solutions, LLC, 118 A.D.3d 605, 989 N.Y.S.2d 20 (1st Dep't 2014) 14

Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997) 10

Best Van Lines, Inc. v. Walker, 490 F.3d 239 (2d Cir. 2007) 8

Boelter v. Hearst Communs., Inc., 2016 U.S. Dist. LEXIS 12322 (S.D.N.Y. Jan. 28, 2016) 18

Burda Media, Inc. v. Viertel, 417 F.3d 292 (2d Cir. 2005) 6

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174 (1985) 12

Chavous v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth., 201 F.R.D. 1 (D.D.C. 2001) 17

Chepilko v. City of New York, 2012 U.S. Dist. LEXIS 94636 (E.D.N.Y. July 6, 2012) 16

Chesney v. Valley Stream Union Free Sch. Dist., 236 F.R.D. 113 (E.D.N.Y. 2006) 16, 17, 18

Cortlandt Racquet Club, Inc. v. OY Saunatec, Ltd., 978 F. Supp. 520 (S.D.N.Y. 1997) 11

Diesel Systems, Ltd. v. Yip Shing Diesel Eng. Co., Ltd., 861 F. Supp. 179 (E.D.N.Y. 1994) 9

Doner-Hendrick v. N.Y. Inst. of Tech., 2011 WL 2652460 (S.D.N.Y. July 6, 2011) 14

EAC Systems, Inc. v. Chevie, 154 A.D.2d 813, 546 N.Y.S.2d 252 (3d Dep't 1989) 9

EEOC v. CRST Van Expedited, Inc., 2009 U.S. Dist. LEXIS 46204 (N.D. Iowa June 2, 2009) 15

Esposito v. VIP Auto, 2008 Me. Super. LEXIS 143 (Me. Super. Ct. May 6, 2008) 15

Feathers v. McLucas, 15 N.Y.2d 443, 261 N.Y.S.2d 8 (1965) 10

Hachette Distribution, Inc. v. Hudson County News Co., Inc., 136 F.R.D. 356 (E.D.N.Y. 1991) 18

Harris v. City of New York, 186 F.3d 243 (2d Cir. 1999) 13

Henderson v. INS, 157 F.3d 106 (2d Cir. 1998) 8

Hoffman v. Parade Publis., 15 N.Y.3d 285, 907 N.Y.S.2d 145 (2010) 14

Ingraham v. Carroll, 90 N.Y.2d 592, 665 N.Y.S.2d 10 (1997) 11

Kassner v. 2nd Ave. Delicatessen Inc., 496 F.3d 229 (2d Cir. 2007) 13

Khan v. Khan, 360 Fed. Appx. 202 (2d Cir. 2010) 6

Kinetic Instruments, Inc. v. Lares, 802 F. Supp. 976 (S.D.N.Y. 1992) 9

Kramer v. Time Warner, Inc., 937 F.2d 767 (2d Cir. 1991) 13

McGowan v. Smith, 52 N.Y.2d 268, 437 N.Y.S.2d 643 (1981) 8, 9

OMI Holdings v. Royal Ins. Co., Canada, 149 F.3d 1086 (10th Cir. 1998) 12

Omni Capital Int'l, Ltd. v. Rudolph Wolff & Co., 484 U.S. 97,
108 S. Ct. 404 (1987) 6

Petrus v. Bowen, 833 F.2d 581 (5th Cir. 1987) 16

Phillips v. Reed Group, Ltd., 955 F. Supp. 2d 201 (S.D.N.Y. 2013) 7

Satz v. Taipina, 2003 U.S. Dist. LEXIS 27237 (D.N.J. Apr. 15, 2003) 15

Spencer Trask Software and Info. Servs., LLC v. Rpost Int'l Ltd.,
206 F.R.D. 367 (S.D.N.Y. 2002) 17

Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917) 8

Thomas v. Ashcroft, 470 F.3d 491 (2d Cir. 2006) 7

Tromp v. City of New York, 465 F. App'x 50 (2d Cir. 2012) 16

Twine v. Levy, 746 F. Supp. 1202 (E.D.N.Y. 1990) 8, 9

Union Underwear Co. v. Barnhart, 50 S.W. 3d 188 (K.Y. 2001) 15

United States v. Cnty. Of Nassau, 188 F.R.D. 187 (E.D.N.Y. 1999) 17

Wang v. Paterson, 2008 U.S. Dist. LEXIS 102495 (S.D.N.Y. Dec. 18, 2008) 16

Statutes, Treaties and Authorities

New York State Executive Law § 296 14

Fed. R. Civ. P. 4 6

Fed. R. Civ. P. 12(b) .... *passim*

Fed. R. Civ. P. 26(c) 16

CPLR §301 .... *passim*

CPLR §302 .... *passim*

Hague Convention of November 15, 1965 on the Service Abroad
of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1

2 Jack B. Weinstein, et al., New York Civil Practice, CPLR ¶ 302.00
(2d ed. 2004) 9

Defendant George El-Hani ("El-Hani") respectfully submits this memorandum of law in support of his motion for an order, pursuant to Federal Rules of Civil Procedure 12(b)(2), (5) and (6) and 26(c)(1), dismissing the Complaint of Plaintiff Jessy Boustany ("Plaintiff"), staying all discovery pending the determination of the motion, and granting such other and further relief as the Court deems just and proper.[1]

I. INTRODUCTION

Plaintiff Boustany is a Lebanese citizen presently living in Dubai in the United Arab Emirates. She has asserted three claims under the New York State Human Rights Law against Defendant El-Hani, a resident of Lebanon. None of her claims against El-Hani is alleged to have occurred in New York, or has any connection to New York. Each of the claims involves Plaintiff's working relationship with El-Hani when each was employed by the Lebanese registered office of Xylem Water Systems Deutschland GmbH, a German subsidiary of Defendant Xylem Inc. ("Xylem"), in Lebanon. Plaintiff's claims against Defendant El-Hani must be dismissed for the following reasons.

First, Defendant El-Hani has yet to be properly served with process in this action. The "Notice & Notification" filed in the action states that the Summons and Complaint were served upon El-Hani's housekeeper at his home in Lebanon, but the address listed in the document is not, in fact, El-Hani's home but a commercial building. Lebanon is not a signatory to the Hague Convention of November 15, 1965 on the Service Abroad of Judicial and Extrajudicial

[1] Plaintiff declined the Court's invitation permitting her to amend the complaint despite the fact that Defendant El-Hani had noted various deficiencies in the complaint in his pre-motion letter to the Court. For this reason, in the event the Court rules in Defendant El-Hani's favor, Plaintiff should not be afforded an opportunity to amend her complaint in an effort to save it from dismissal.

Documents in Civil or Commercial Matters. Under Lebanese law, the service of the Summons and Complaint is facially defective. Plaintiff has failed to follow any method permitted under Rule 4(f) of the Federal Rules of Civil Procedure for serving an individual in Lebanon.

Second, neither CPLR §301 nor §302 – the relevant New York jurisdictional provisions applicable to non-domiciliaries like Defendant El-Hani –support this Court's exercise of jurisdiction over him. The complaint contains no allegations that El-Hani, a Lebanese citizen employed in Lebanon, is engaged in a persistent or systematic course of "doing business" in New York. On the contrary, Defendant El-Hani does not transact or solicit business in New York, nor does he own property or investments in New York. In fact, El-Hani has visited New York just three times in his life, the last time in 2012. Nor is El-Hani subject to long-arm jurisdiction under CPLR § 302, New York's long-arm statute. The complaint does not allege that El-Hani transacted business within the state, committed a tortious act within the state, or committed a tortious act outside the state causing injury within the state.

Third, even if service of the summons and complaint had been adequate and the Court had jurisdiction over Defendant El-Hani, Plaintiff's claims must be dismissed. The Court of Appeals has held that a non-resident of New York, like Plaintiff, in order to sufficiently allege a claim under the New York State Human Rights Law, must plead that the alleged discriminatory conduct had an impact in New York. Plaintiff made no such allegations as against Defendant El-Hani. In fact, the allegations in the complaint emphasize that the impact of alleged discriminatory conduct occurred in Lebanon, where Plaintiff worked and was subsequently terminated.

Fourth, Plaintiff previously signed an employment agreement requiring all employment disputes to be "settled by the labor courts in Beirut" and later signed an agreement stating that she would not bring claims against El-Hani. These documents bar her from maintaining this action in New York, and require its dismissal.

Pending resolution of El-Hani's motion to dismiss Plaintiff's complaint for insufficient service, lack of personal jurisdiction and failure to state a claim, this Court should stay discovery. Numerous federal courts have held that challenges to jurisdiction or the legal sufficiency of a claim should be resolved before discovery begins. This precedent has more force here, where Plaintiff has already commenced proceedings against Defendants in Lebanon.

II. BACKGROUND

A. Plaintiff's Complaint

Plaintiff Boustany alleges that she is a resident of Beirut, Lebanon. El-Hani Ex. A, Complaint, ¶6. Plaintiff further alleges that, at all relevant times, Defendant El-Hani was "an employee of Defendant XYLEM and was Plaintiff BOUSTANY's direct supervisor and/or held supervisory authority over Plaintiff BOUSTANY." *Id.*, ¶9. According to Plaintiff Boustany, Defendant El-Hani made unwanted advances toward her at an office in Lebanon (*id.*, ¶¶21-25), and on business trips to Austria (¶27), Italy (¶28), Chicago (¶30) and Texas (¶31). She alleges that, on or about September 2013, she complained to the regional director of Xylem, Valerie Lassalle, about Defendant El-Hani's "harassment," and that Lassalle reported the matter to Cornett Lewers, a Chief Ethics and Compliance Officer in Xylem's New York headquarters. (¶¶35-37). She further alleges that, on or about December 2013/January 2014, Defendant El-Hani demoted her, requiring her to report to a manager in Dubai. (¶44). She alleges that Defendant El-Hani repeatedly interfered with her work after she had lodged her complaints. (¶¶45-48). She alleges that, as a result of her complaints, Defendant El-Hani was "released from employment" in March 2014, but that Plaintiff thereafter continued to be penalized by Xylem, which failed to give her positions for which she was well qualified and delayed reimbursing her business expenses. (¶¶51-52.) She alleges that she was terminated in November 2014, without explanation, "as a condition precedent to Defendant Xylem's business offer to Defendant El-Hani." (¶¶52-53.) She alleges that "Plaintiff was terminated solely in retaliation of her complaints of Defendants' numerous violations of the law." (¶59.) She has asserted claims against only Xylem under Title VII of the Civil Rights Act of 1964, and against both Xylem and E-Hani under New York State Executive Law § 296.

B. Service of the Complaint

The Complaint was filed on December 23, 2015. *See* El-Hani Ex. A.[2] The Summons issued from the Court regarding El-Hani lists his address at "Xylem Inc., 1133 Westchester Avenue, White Plains," [3]which Plaintiff erroneously describes as El-Hani's "Place of Employment." Defendant El-Hani has never worked for Defendant Xylem. *See* El-Hani Cert., ¶8. On March 16, 2016, Plaintiff filed a document styled "Notice and Notification" (El-Hani Ex. C). This document, which is the equivalent of a United States proof of service, was prepared by a Lebanese court appointed server. *See* Astourian Cert., ¶5.[4] The document (translated in English on page 1; and in Arabic handwriting on page 3) states that service was made on Mr. El Hani on February 8, 2016 at the following address: Baabda – Ghaleb Center – Third Floor. El-Hani Ex. C. The document further states that the document was delivered to Defendant El-Hani's "housemaid" at his "house." *Id.* "Baabda – Ghaleb Center – Third Floor," however, is the address of a commercial building which, since August, 2014, has been an assigned business address for Levica, a company owned by Mr. El-Hani. El-Hani Cert., ¶15. The address of Defendant El-Hani's house appears nowhere on the Notice and Notification. *Id.* His housekeeper, the person who purportedly received the Summons and Complaint (El-Hani Ex. C), does not work at "Baabda – Ghaleb Center – Third Floor." El-Hani Cert., ¶15.

---

[2] "El-Hani Ex. __" refers to an exhibit attached to the accompanying Certification of George Antoine El-Hani ("El-Hani Cert."), dated March 25, 2016.

[3] *See* Document No. 5 in the Court's electronic file.

[4] "Astourian Cert." refers to the accompanying Certification of Paro Astourian, Esq., dated March 28, 2016.

Defendant El-Hani's Lack of New York Contacts

Defendant El-Hani is a life-long resident of Lebanon and presently resides and works there. El-Hani Cert., ¶¶2-3. During the period relevant to Plaintiff's complaint, *i.e.*, July, 2012 to November, 2014, he was first employed as a consultant in Lebanon by Lowara Srl, an Italian manufacturer of water pumps and drives owned by ITT Corporation; and then, after ITT spun off its water-related businesses to form Xylem, from June 4, 2013 to April 28, 2014, Defendant El-Hani worked in Lebanon for the Lebanese registered representative of Xylem Water Systems Deutschland GmbH, a subsidiary of Defendant Xylem formed under the laws of Germany. *Id.*, ¶8. Since April 28, 2014, El-Hani has not worked for any company affiliated with Xylem. *Id.* Presently, Defendant El-Hani is employed by Levica Group ("Levica"), an off-shore Lebanese company with offices in Baabda, Lebanon, which El-Hani founded in July, 2014. *Id.*, ¶3. Levica provides electromechanical products and solutions, such as water and waste water treatment equipment, valves, boilers, pressure tanks and fans. *Id.*, ¶4. It purchases equipment in Beirut, Lebanon for sale for use in Nigerian construction projects. *Id.*

Defendant El-Hani has almost no connection to New York. He has traveled to New York just three times in his entire life, the last time in 2012 to briefly attend an ASHRAE conference. *Id.*, ¶¶6, 9. He has never solicited or transacted business in New York. *Id.*, ¶7. He has no bank accounts in New York, nor does he have any investments or property interests in New York. *Id.* He has never paid income taxes in New York. *Id.*

III. ARGUMENT

A. This Action Must Be Dismissed As Against Defendant El-Hani

1. The Complaint Against Defendant El-Hani Must Be Dismissed Because of Service of Process is Defective

"On a Rule 12(b)(5) motion to dismiss, the plaintiff bears the burden of establishing that service was sufficient. " *Khan v. Khan*, 360 Fed. Appx. 202, 203 (2d Cir. 2010) (citing *Burda Media, Inc. v. Viertel,* 417 F.3d 292, 298 (2d Cir. 2005)). "Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital Int'l, Ltd. v. Rudolph Wolff & Co.,* 484 U.S. 97, 104, 108 S. Ct. 404 (1987). Rule 4(f) of the Federal Rules of Civil Procedure states that an individual in a foreign country where there is no "internationally agreed means of service" may be served with the summons and complaint:

> (A) As prescribed by the foreign country's laws for service in that country in an action in its courts of general jurisdiction;
>
> (B) as the foreign authority directs in response to a letter rogatory or letter of request.
>
> (C) unless prohibited by the foreign country's law, by:
>
> (i) delivering a copy of the summons and of the complaint to the individual personally; or
>
> (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
>
> (3) by other means not prohibited by international agreement, as the court orders.

Here, Plaintiff did not follow any of the permitted methods under Rule 4(f) for service upon Defendant El-Hani in Lebanon, including comporting with Lebanese law. As stated in the accompanying Astourian Certification, the "Notice and Notification" filed in this case is defective under Lebanese law, Astourian Cert., ¶¶ 4-6, requiring the complaint's dismissal.

2. This Court Lacks Personal Jurisdiction of Defendant El-Hani

Plaintiff's complaint does not contain a single allegation that Defendant El-Hani transacted business in New York or traveled to New York with Plaintiff. The only connection that New York has to this litigation is that Defendant Xylem, an Indiana corporation, maintains its principal place of business in White Plains, New York. Xylem owns Xylem Water Systems Deutschland GmbH, the German company that Plaintiff and Defendant El-Hani worked for in Lebanon. Even assuming that Plaintiff made complaints about Defendant El-Hani to Xylem representatives located in White Plains, New York, and that Xylem officials in New York decided (long after El-Hani had left the company) to terminate Plaintiff, there is no legal basis for asserting jurisdiction in New York over Defendant El-Hani.

a. Standards for Dismissal for Lack of Personal Jurisdiction

Federal Rule of Civil Procedure 12(b)(2) "permits a defendant to challenge a court's personal jurisdiction over it prior to the filing of an answer or the commencement of discovery." *A.W.L.I. Group, Inc. v. Amber Freight Shipping Lines,* 828 F. Supp. 2d 557, 558 (E.D.N.Y. 2011). A court is permitted to rely upon material outside the pleadings in considering a motion to dismiss for lack of personal jurisdiction. *Phillips v. Reed Group, Ltd.,* 955 F. Supp. 2d 201, 225 (S.D.N.Y. 2013) (when considering a 12(b)(2) motion, "the Court may also rely on submitted affidavits and other supporting materials submitted in relation to the motion."). When responding to a Rule 12(b)(2) motion, "the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant." *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 171 F.3d 779, 784 (2d Cir. 1999). *See also Thomas v. Ashcroft,* 470 F.3d 491, 495

(2d Cir. 2006) (plaintiff has the *prima facie* burden of demonstrating personal jurisdiction over the defendant).

To determine personal jurisdiction over an individual defendant, a court looks to the law of the state in which the district court sits. *Best Van Lines, Inc. v. Walker,* 490 F.3d 239, 242 (2d Cir. 2007); *Henderson v. INS,* 157 F.3d 106, 123 (2d Cir. 1998); *Arrowsmith v. United Press Intern.,* 320 F.2d 219, 223 (2d Cir. 1963) (diversity jurisdiction determined under the law of the forum). In New York, personal jurisdiction is determined under CPLR §§ 301 and 302. If this Court determines that it may exercise jurisdiction over Defendant El-Hani under New York law, it must then consider "whether asserting jurisdiction under that provision would be compatible with requirements of due process established under the Fourteenth Amendment to the United States Constitution." *Id.*

b. Defendant El-Hani Does Not Regularly Transact Business in New York

CPLR § 301 provides that New York courts have jurisdiction over a person "'engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of [his] 'presence' in the jurisdiction.'" *Arrow Trading Co. v. Sanyei Corp.*, 576 F. Supp. 67, 69 (S.D.N.Y. 1983) (quoting *McGowan v. Smith*, 52 N.Y.2d 268, 437 N.Y.S.2d 643, 645 (1981)). Under New York law, the "'doing business' standard requires more than just occasional or casual business activities within the state; rather, the defendant's conduct must be 'with a fair measure of permanence and continuity.'" *Twine v. Levy*, 746 F. Supp. 1202, 1204 (E.D.N.Y. 1990) (quoting *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915 (1917)). Here, there is no evidence that El-Hani, a Lebanese citizen living and working in Lebanon, is engaged in anything close to a persistent course of "doing business" in New York. Defendant El-Hani does not maintain an office, bank account or residence in New York, and he does not solicit any business in New

York. His minimal contacts with New York, such as attending an occasional conference, do not come close to establishing jurisdiction over him pursuant to CPLR §301. *See Diesel Systems, Ltd. v. Yip Shing Diesel Eng. Co., Ltd.*, 861 F. Supp. 179 (E.D.N.Y. 1994) (no jurisdiction over defendants pursuant to CPLR §301 where plaintiff failed to demonstrate that defendant systematically did business in New York); *Kinetic Instruments, Inc. v. Lares*, 802 F. Supp. 976 (S.D.N.Y. 1992) (defendant's periodic visits to New York did not satisfy "doing business" standard). Even if Defendant El-Hani spoke with Xylem representatives in New York – and there is no allegation he did so – New York lacks jurisdiction over him. *See Twine,* 746 F. Supp. at 1205 (phone calls and letters to persons in New York does not establish a pattern of continuous business activity "that would even approach the threshold of doing business for the purposes of CPLR 301").

c. New York's "Long-Arm" Statute Does Not Permit Jurisdiction Over Defendant El-Hani

Under CPLR § 302, New York courts can assert long-arm jurisdiction over non-domiciliary individuals and corporations that are not subject to general jurisdiction. Jurisdiction under CPLR § 302 is, however, restricted to the contacts listed in the statute, and the claim over which jurisdiction is asserted must arise out of those contacts. *See generally* 2 Jack B. Weinstein, et al., New York Civil Practice CPLR ¶ 302.00, at 3-57 (2d ed. 2004). It is apparent that Plaintiff cannot secure jurisdiction over Defendant El-Hani under CPLR § 302.

Defendant El-Hani is not subject to jurisdiction under the "transacting business" test set forth in CPLR §302(a)(1). For the court to assert jurisdiction under CPLR §302(a)(1), there must be a direct and substantial relationship between the defendant's activities in New York and the cause of action asserted. *See McGowan*, 437 N.Y.S.2d at 645; *EAC Systems, Inc. v. Chevie*, 154 A.D.2d 813, 814, 546 N.Y.S.2d 252 (3d Dep't 1989); *Diesel Systems*, 861 F. Supp. at 182. Here, Plaintiff has conceded that all of El-Hani's activities on which the complaint is based took place outside of New York.

CPLR §302(a)(2) also is not applicable. That section states that a non-domiciliary may be subject to jurisdiction in New York if he "commits a tortious act within the state …" As the United States Court of Appeals for the Second Circuit stated in *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 28 (2d Cir. 1997), CPLR §302(a)(2) "reaches only tortious acts performed by a defendant who was physically present in New York when he performed the wrongful act." *See also Feathers v. McLucas*, 15 N.Y.2d 443, 458, 261 N.Y.S.2d 8 (1965) (same). Thus, in *Bensusan*, the court dismissed a federal trademark action against a Missouri nightclub that was allegedly infringing on the trademark of a famous New York jazz club because the defendant's alleged infringing activity was taking place in Missouri and not in New York. El-Hani has not been with Plaintiff in New York.

CPLR §302(a)(3) is also unavailing. Section 302(a)(3) states that a New York court may exercise jurisdiction over a non-domiciliary that:

> 3. commits a tortious act without the state causing injury to person or property within the state …, if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;

Plaintiff cannot demonstrate that she has suffered an "injury" in New York. She does not allege that she was ever present in New York; she is a Lebanese citizen presently living in Dubai. Moreover, even if Plaintiff could establish an injury in New York, which she cannot, neither CPLR §302(a)(3)(i) nor (ii) applies. According to the Court of Appeals, "the Legislature limited CPLR

§302(a)(3)(i) jurisdiction to extend only to those 'who have sufficient contacts with this state so that it is not unfair to require them to answer in this state for injuries they cause here by acts done elsewhere.'" *Ingraham v. Carroll*, 90 N.Y.2d 592, 665 N.Y.S.2d 10 (1997). According to *Ingraham*, CPLR §302(a)(3)(i) necessitates some kind of on-going business activity within New York State. In the instant case, Plaintiff does not allege that El-Hani regularly solicits or does business in New York. In fact, Defendant El-Hani is not doing any business at all in New York; rather, he sells goods bought in Lebanon to companies located in Nigeria. El-Hani Cert., ¶4.

Likewise, there is no jurisdiction over Defendant El-Hani under CPLR §302(a)(3)(ii). To establish jurisdiction under this provision, Plaintiff would have to demonstrate that Defendant El-Hani: (1) "expects or should reasonably expect the act to have consequences in the state"; and (2) "derives substantial revenue from interstate or international commerce." She has satisfied neither condition. First, El-Hani would have no objective basis for believing that his employment practices in Lebanon vis-à-vis another Lebanese employee would have consequences any place other than in Lebanon. *See Cortlandt Racquet Club, Inc. v. Oy Saunatec, Ltd.*, 978 F. Supp. 520 (S.D.N.Y. 1997) (holding that CPLR §302(a)(3)(ii) was inapplicable because it was not foreseeable that allegedly tortious act in Germany would have consequences in New York). Moreover, El-Hani does not derive "substantial revenue" from international commerce but, instead, confines his activities to Lebanon and Nigeria. El-Hani Cert., ¶4. As the Court of Appeals stated in *Ingraham*, 90 N.Y.2d at 598, the "substantial revenue" component of CPLR §302(a)(ii) narrows the exercise of jurisdiction over non-domiciliaries to those entities who are "economically big enough" to defend suit in New York. Plaintiff has not alleged that Defendant El-Hani's business operations are international in scope. Thus, CPLR §302(a)(ii) does not support the exercise of jurisdiction over him. *See*

Ingraham, 90 N.Y.2d at 598 (holding that there was no jurisdiction over Vermont doctor who periodically referred patients from New York and consulted with New York doctors).

d. The Exercise of Jurisdiction Over Defendant El-Hani Would Offend Traditional Notions of Fair Play and Substantial Justice

The exercise of personal jurisdiction over Defendant El-Hani "would offend traditional notions of fair play and substantial justice." *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 113, 107 S. Ct. 1026 (1987) (internal quotations omitted). Courts consider the following factors when making the determination as to whether the exercise of jurisdiction would offend traditional notions of fair play and substantial justice: the burden on the defendant, the forum States interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 477, 105 S. Ct. 2174 (1985) (internal quotations omitted). Here, Defendant El-Hani has no contacts in New York and it would be significantly burdensome and costly for him to defend the suit in New York, thousands of miles from his home and office in Lebanon. El-Hani Cert., ¶¶11, 13. *See OMI Holdings v. Royal Ins. Co., Canada*, 149 F.3d 1086, 1096 (10th Cir. 1998) ("While not dispositive, the burden on the defendant of litigating the case in a foreign forum is of primary concern in determining the reasonableness of personal jurisdiction."). Moreover, the State of New York does not have a strong interest in adjudicating this dispute because Plaintiff's central allegations concern employment practices of a Lebanese-based representative of a German company. Thus, even if the Court were to find sufficient minimum contacts to support personal jurisdiction, it should dismiss the action on the grounds that such exercise would not comport with due process.

3. Plaintiff Has Failed to State a Cause of Action Against Defendant El-Hani Under New York Executive Law §296

a. Standards for Dismissal for Failure to State a Claim

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. A Rule 12(b)(6) dismissal is proper where "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Harris v. City of New York,* 186 F.3d 243, 247 (2d Cir. 1999). As a general rule, "[i]n considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference." *Kramer v. Time Warner, Inc.,* 937 F.2d 767, 773 (2d Cir. 1991). The court accepts all factual allegations pleaded in the complaint as true, and construes them and draws all reasonable inferences from them in favor of the non-moving party. *Kassner v. 2nd Ave. Delicatessen Inc.,* 496 F.3d 229, 237 (2d Cir. 2007).

The court need not, however, accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."). Thus, a plaintiff's complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009*); see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." (citations omitted)).

b. Plaintiff Has Failed to Allege that Defendant El-Hani's Conduct Had Any Impact in New York

Plaintiff concedes that she is a resident of "Beirut, Lebanon in the Middle East." El-Hani Ex. A., Complaint, ¶6. The New York Court of Appeals has held that a non-resident of New York, like Plaintiff, in order to sufficiently allege a claim under New York State Executive Law § 296 ("NYSHRL"), must plead that the alleged discriminatory conduct had an impact in New York. *Hoffman v. Parade Publis.,* 15 N.Y.3d 285, 292, 907 N.Y.S.2d 145 (2010) (Georgia resident who periodically met with supervisors in New York and was terminated as a result of a management decision in New York had no claim under NYSHRL); *Benham v. eCommission Solutions, LLC,* 118 A.D.3d 605, 606, 989 N.Y.S.2d 20 (1st Dep't 2014) ("Because the alleged conduct occurred while plaintiff was physically situated outside of New York, none of her concrete allegations of harassing behavior or other discriminatory conduct had the 'impact' on plaintiff in New York required to support claims under the State and City [Human Rights Laws].").

Even assuming arguendo that Plaintiff worked for Defendant Xylem, as she alleges in her complaint (in fact, she did not; she worked for a German subsidiary of Xylem), she has no NYSHRL claim against Defendant El-Hani because his alleged discriminatory conduct had no impact in New York. *See, e.g., Doner-Hendrick v. N.Y. Inst. of Tech.*, 2011 WL 2652460, at *8 (S.D.N.Y. July 6, 2011) (dismissing plaintiff's claims under NYSHRL on the grounds that the plaintiff, a non-resident professor working at the Amman, Jordan campus of the New York

Institute of Technology, could not show the required "impact" in New York by relying on the allegation that her termination had an effect on the entire faculty of the college, including employees in New York, because "they saw their administration 'behave in such a wanton and unlawful way' toward plaintiff."). Under New York law, the NYSHRL claims against Defendant El-Hani must be dismissed.

The *Hoffman* decision is in accord with decisions of other states holding that the location of the corporate headquarters or principal place of business is irrelevant in determining whether state anti-discrimination statutes apply to nonresident plaintiffs. *See, e.g., EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 46204, at *59 (N.D. Iowa June 2, 2009) (dismissing sexual harassment claims "[b]ecause nothing in the purpose, subject matter or history of the ICRA clearly expresses or indicates that the Iowa General Assembly intended the ICRA to operate beyond the borders of the State of Iowa."); *Satz v. Taipina*, 2003 U.S. Dist. LEXIS 27237, at *49 (D.N.J. Apr. 15, 2003) (noting that New Jersey location of defendant's headquarters does not trigger application of the NJLAD when plaintiff did not work in New Jersey); *Arnold v. Cargill, Inc.*, 2002 U.S. Dist. LEXIS 13045, at *11 (D. Minn. July 15, 2002) ("The fact that [defendant's] headquarters are located in . . . Minnesota is insufficient to justify extraterritorial application [of Minnesota's Human Rights Act]."); *Union Underwear Co. v. Barnhart*, 50 S.W. 3d 188, 190-93 (K.Y. 2001) (rejecting plaintiff's argument that he had a claim under the Kentucky Civil Rights Act because defendant's headquarters were located in Kentucky);, *Albert v. DRS Techs., Inc.*, 2011 U.S. Dist. LEXIS 55320, at *5 (D. N.J. May 23, 2011)(dismissing NJLAD claim of Florida resident working at Florida office of New Jersey Company); *Esposito v. VIP Auto*, 2008 Me. Super. LEXIS 143, at *5 (Me. Super. Ct. May 6,

2008) (plaintiff who neither worked nor resided in Maine could not assert a claim under the MHRA).

c. Plaintiff is Barred From Asserting Claims Against Defendant El-Hani

Plaintiff executed an employment agreement on June 13, 2013 (as did defendant El-Hani). Article 18 of each employment agreement requires all disputes related to employment to be "settled by the labor courts in Beirut." El-Hani Ex. B-1 and B-2. Moreover, in April, 2014, Plaintiff executed an agreement (written in Arabic and English) in which she expressly agreed not to "initiate any claim and/or legal action in any manner whatsoever against Mr. George El-Hani ... particularly in light of his having ended his services with the Company, which addresses the issue." El-Hani Ex. B. She further agreed that "this acknowledgement and undertaking is final, binding and irrevocable." *Id.* These documents bar Plaintiff from asserting the employment claims she has brought against El-Hani in this New York proceeding.

The defense that a claim is barred by a contract may be asserted on a Rule 12(b)(6) motion. *See, e.g., Tromp v. City of New York,* 465 F. App'x 50, 52-53 (2d Cir. 2012) (affirming dismissal based on contractual release); *Chepilko v. City of New York,* 2012 U.S. Dist. LEXIS 94636, at *2-4 (E.D.N.Y. July 6, 2012) (dismissing case under Rule 12(b)(6) after finding claims barred by release); *Wang v. Paterson,* 2008 U.S. Dist. LEXIS 102495, at *4-8 (S.D.N.Y. Dec. 18, 2008) (same). Thus, even if Plaintiff had viable NYSHRL claims against Defendant El-Hani – which she does not – she is contractually barred from asserting them here.

B. Pending this Court's Determination of this Motion, All Discovery Should Be Stayed

Pursuant to the Federal Rules of Civil Procedure, a court has discretion to stay discovery "for good cause shown." Fed. R. Civ. P. 26(c)(1); *see also Chesney v. Valley Stream Union Free*

Sch. Dist., 236 F.R.D. 113, 115 (E.D.N.Y. 2006) (staying discovery for "good cause" where there were substantial issues raised as to viability of claims in pending motions); *Petrus v. Bowen,* 833 F.2d 581, 583 (5th Cir. 1987) (same). A party shows good cause for a stay of discovery where disposition of a pending motion could entirely eliminate the need for such discovery, the stay is for a short period of time, and the opposing party will not be prejudiced by the stay. *Anti-Monopoly, Inc. v. Hasbro, Inc.,* 1996 U.S. Dist. LEXIS 2684, at *6 (S.D.N.Y. March 7, 1996) (collecting cases); *see also Anderson v. United States Attorneys Office,* 1992 WL 159186, at *1 (D.D.C. June 19, 1992) ("It is well settled that discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending."); *Chavous v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001) ("A stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.").

Among the factors to be considered in whether to grant a stay of discovery in the face of a dispositive motion, is the burden of responding to the contemplated discovery and the strength of the dispositive motion forming the basis for the stay request. *Chesney*, 236 F.R.D. at 115; *Spencer Trask Software and Info. Servs., LLC v. Rpost Int'l Ltd.,* 206 F.R.D. 367, 368 (S.D.N.Y. 2002) (granting stay of discovery pending determination of motion to dismiss where court found defendants presented substantial arguments for dismissal of many if not all of the claims in the lawsuit); *United States v. Cnty. Of Nassau*, 188 F.R.D. 187, 188-89 (E.D.N.Y. 1999) (granting stay of discovery during pendency of a motion to dismiss where the "interests of fairness, economy and efficiency . . . favor[ed] the issuance of a stay of discovery"). "Courts also may take into consideration the nature and complexity of the action, whether some or all of the defendants have joined in the request for a stay, and the posture or stage of the litigation." *Chesney,* 236 F.R.D. at 115 (citing *Hachette Distribution, Inc. v. Hudson County News Co., Inc.,* 136 F.R.D. 356, 358 (E.D.N.Y. 1991)).

Here, the burden to Defendant El-Hani of being required to participate in discovery in New York is substantial. He is a citizen of Lebanon, where there is already a legal proceeding in that country involving him that Plaintiff initiated. El-Hani Cert., ¶14. By bringing this action, Plaintiff has violated the agreements she executed in Lebanon. His motion for dismissal is likely to be granted by this Court and will result in the dismissal of the complaint against him. Plaintiff will not be prejudiced if the stay of discovery is continued for the short time it takes the Court to determine Defendant El-Hani's dismissal motion. Under these circumstances, a stay of discovery is warranted. *See Boelter v. Hearst Communs., Inc.,* 2016 U.S. Dist. LEXIS 12322, at *6 (S.D.N.Y. Jan. 28, 2016) (granting stay of discovery where defendant had moved for dismissal of complaint and court found "ordering discovery to proceed at this time would result in an excessive burden on Defendant.").

IV. CONCLUSION

For the foregoing reasons, Defendant El-Hani respectfully requests that this Court dismiss the Complaint as against him, continue the stay of discovery during the pendency of this dismissal motion, and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 4, 2016

STEWART OCCHIPINTI, LLP

By:____________________________
Charles A. Stewart, III (CS 7099)
Attorneys for Defendant George El-Hani